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Supreme Court of the United States

OCTOBER TERM, 1939.

No. 667.

JOHN CARLSON,

Appellant,

against

THE STATE OF CALIFORNIA,

Appellee.

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE.

AMERICAN CIVIL LIBERTIES UNION
as amicus curiae.

OSMOND K. FRAENKEL,
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Supreme Court of the United States

OCTOBER TERM, 1939.

No. 667.

JOHN CARLSON,

Appellant,

against

THE STATE OF CALIFORNIA,

Appellee.

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE.

The American Civil Liberties Union is concerned with this case because it has always regarded peaceful picketing as an appropriate, and in most circumstances, an essential manifestation of freedom of speech and of the press. In labor controversies it is particularly important that strikers may, by placard or oral statement, convey to the public the facts of their controversy at the place where the controversy exists. While such activity on the part of strikers is, like all other public action, subject to supervision by the police in the interests of public order, the American Civil Liberties Union believes that statutory prohibition of all peaceful picketing violates the constitutional guaranties.

Statement of the Case.

In the instant case petitioner was charged with violation of an ordinance of the County of Shasta, California. The relevant portions of the ordinance are as follows:

> "Section 2. It shall be unlawful for any person, in or upon any public street, highway, sidewalk, alley or other public place in the County of Shasta, State of California, to loiter in front of or in the vicinity of, or to carry, show or display any banner, transparency, badge or sign in front of, or in the vicinity of, any works, or factory, or any place of business or employment, for the purpose of inducing or influencing, or attempting to induce or influence * * * any persons to refrain from doing or performing any service or labor in any works, factory, place of business or employment * * *" (R. 68).

The complaint (R. 1) charged appellant with having picketed the Delta Tunnel Project operated by the United Concrete and Pipe Company. Appellant had been employed by that concern (R. 30). He and others picketed the plant after an unsuccessful attempt to negotiate a collective bargaining contract (R. 32).

The People's only witness at the trial, an Assistant District Attorney, stated that the picketing was orderly and peaceful, without intimidation or threats (R. 26, 27). It occurred on the public highway (R. 26), without interference with pedestrian or vehicle traffic (R. 27).

Appellant raised the issue of the constitutionality of the ordinance at every possible opportunity: by demurrer to the complaint (R. 6), at the conclusion of the People's case (R. 28); at the end of the entire case (R. 66) and by motion in arrest of judgment (R. 11).

The issue was presented on the appeal to the Superior Court (R. 16). And that Court expressly passed on and overruled the constitutional claim (R. 72). While the

opinion then rendered, like the earlier opinion there relied on (R. 73), does not expressly refer to the United States Constitution, appellant had urged throughout that the statute was unconstitutional on the ground that it violated rights of freedom of speech, of the press and of assembly guaranteed by the due process clause of the Fourteenth Amendment (see particularly R. 3, 6, 12).

POINT I.

The ordinance denies petitioner's right of free speech in violation of the process clause to the Fourteenth Amendment.

The ordinance, as applied in the case at bar, prohibits all peaceful picketing. This, we submit, may not constitutionally be done. As Mr. Justice Brandeis said in *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468, 478 (1936):

> "Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."

The thought implicit in this quotation, that the right to make known the facts of a labor dispute is part of the right of freedom of speech, has been recognized by many Courts. Thus the Supreme Court of Nevada, in *City of Reno* v. *Second Judicial District Court* (1939), 95 P. 2nd 994, held void an ordinance banning all picketing on the express ground that peaceful picketing was "immune from legislative interdiction by reason of constitutional guaranties." And the Supreme Court of Colorado, in *People* v. *Harris* (1939), 104 Colo. 386, 91 P. 2nd 989, refused to permit an application of a similar statute to facts identical with those in the case at bar, holding that such application would be a denial of freedom of speech. In *People* v. *Garcia* (1939),

3 Cal. Supp. 171, 98 P. 2nd 265 (Cal. Superior Ct., App. Dept.), an ordinance of Los Angeles was declared void on this ground.

See also concurring opinion of Schauer, J., in *People* v. *Gidaly* (1939), 3 Cal. Supp. 125, 93 P. 2nd 660 (Cal. Superior Ct., App. Dept.); *People* v. *Ribinovick* (1939), 171 Misc. 569, 13 N. Y. Supp. 2nd 135, and *City of St. Louis* v. *Gloner* (1907), 210 Mo. 502, 109 S. W. 30.

Similar views were expressed in cases which did not involve ordinances: *Truax* v. *Bisbee Local No. 380* (1918), 19 Ariz. 379, 171 P. 121; *Ex parte Lyons* (1938), 94 Calif. App. 70, 81 P. 2nd 190; *Marx & Haas Jeans Clothing Co.* v. *Watson* (1902), 168 Mo. 133, 67 S. W. 391; *Lindsay* v. *Montana Fed. of Labor* (1908), 37 Mont. 264, 96 P. 127; *Individual R. F. S. Owners Ass'n* v. *Penn. Treaty Ass'n* (Pa., 1938), 33 Legal Intelligencer 100. See also *Kraemer Hosiery Co.* v. *American Fed. F. F. H. Workers* (1931), 305 Pa. St. 206, 157 A. 588. See 48 Yale L. J. (1938), 308, 312, id. 1527.

Cases such as *Ferguson* v. *Peake* (1927), 18 F. 2nd 166; *Thomas* v. *City of Indianapolis* (1924), 195 Ind. 440, 145 N. E. 550; *State* v. *Personett* (1923), 114 Kan. 680, 220 P. 520; *Com.* v. *Haffer* (1932), 279 Mass. 73, 180 N. E. 615; *Ex parte Stout* (1917), 82 Tex. Cr. A. 183, 198 S. W. 967, were decided before this Court had pronounced its present views about freedom of speech. They must be deemed overruled.

This Court has recently said, in the *Leaflet Cases*, 308 U. S.,—with reference to state legislation generally:

> "In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic

institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."

There can be no doubt of the effect of the challenged legislation in the case at bar. The California ordinance, as applied here, completely prevents the communication, at the place of employment, of the facts of a labor dispute. It is no answer to say that such facts may be communicated in some other place. The same argument was attempted by the municipalities involved in the *Leaflet Cases*. It was urged that the persons interested in expressing their ideas could do so by methods other than the distribution of leaflets or, by the distribution of leaflets in places other than those prohibited by the ordinances. This Court rejected that argument, saying that:

> "The streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

So here the employer's place of business is the appropriate place for the "dissemination of information and opinion" concerning disputes between the employer and its employees. It may be noted, moreover, that in one of the leaflet cases, *Snyder* v. *Milwaukee*, the persons arrested were pickets involved in a labor dispute who were distributing the leaflets in question while standing in front of their employer's place of business.

And in *Hague* v. *C. I. O.*, 307 U. S. 496, this Court upheld (with a modification not here pertinent) a decree which enjoined enforcement of an ordinance prohibiting the carrying of placards on the streets (see decree annexed to opinion in Circuit Court of Appeals, 101 F. 2nd 774; Find-

ing D, at 792; Conclusion 5, at 794, and Judgment B 3, at 795).

The drastic curtailment of freedom by the legislation here involved cannot be justified by any proper public purpose. No longer is it possible to accept the suggestion made by the Alabama Supreme Court when, in *Hardie-Tynes Manufacturing Company* v. *Cruise* (1914), 189 Ala. 66, 66 So. 657, it first, many years ago, sustained the statute under review in the companion case of *Thornhill* v. *Alabama* (No. 514). That Court there said that the legislature had, perhaps, taken the view that "there is and can be no such thing as peaceful picketing or peaceful persuasion." All modern thinking on this subject proves the contrary. Thus the Congress of the United States in both the Clayton Act (38 Stat. 738, 29 U. S. C. A., § 52) and the Norris-LaGuardia Act (47 Stat. 70, 29 U. S. C. A., 101 ff.) has denied to the Federal Courts the right to enjoin peaceful picketing. Like prohibitions are contained in many state laws (see Appendix A).

And, in the absence of statute, many Courts have declared the legality of peaceful picketing.

Truax v. *Bisbee Local No. 380* (1918), 19 Ariz. 379, 171 P. 121;

Ex parte Lyons (1938), 94 Cal. App. 70, 81 P. 2nd 190;

Loew's Enterprises v. *International Alliance* (1939), 125 Conn. 391, 6 A. 2nd 321;

Weissman v. *Jureit* (1938), 132 Fla. 661, 181 So. 898;

Kargas Furniture Co. v. *Amalgamated, etc., Union* (1905), 165 Ind. 421, 75 N. E. 877;

Music Hall Theatre v. *Moving Picture Machine Operators* (1933), 249 Ky. 639, 61 S. W. 2nd 283;

International Pocketbook Worker's Union v. *Orlove* (1929), 158 Md. 496, 148 A. 826;

Minnesota Stove Co. v. *Cavanaugh* (1915), 131 Minn. 458, 155 N. W. 638;

Marx & Haas Jean Clothing Co. v. *Watson* (1902), 168 Mo. 133, 67 S. W. 391;

Bayonne Textile Corp. v. *Am. Fed. of Silk Workers* (1934), 116 N. J. Eq. 146, 172 A. 551;

Stillwell v. *Kaplan* (1932), 259 N. Y. 405, 182 N. E. 63;

LaFrance v. *I. B. E. W.* (1923), 108 Ohio St. 61, 140 N. E. 899;

Wallace v. *International Association* (1936), 155 Ore. 652, 63 P. 2nd 1090;

Everett Waddey Co. v. *Richmond Typographical Union* (1906), 105 Va. 188, 53 S. E. 273;

Kimbel v. *Lumber & Sawmill Workers Union* (1937), 189 Wash. 416, 65 P. 2nd 1066.

The subject of picketing is exhaustively discussed in *Frankfurter & Greene, The Labor Injunction* (1930), and in *Oakes, The Law of Organized Labor and Industrial Conflicts* (1932). Cf. *Brissenden, The Labor Injunction* (1933), 48 Pol. Sci. Q. 413; *Hellerstein, Picketing Legislation and the Courts* (1932), 10 N. C. L. Rev. 158; *Landis, Introduction to Cases on Labor Law* (1934); *Warm, A Study of the Judicial Attitude Towards Trade Unions and Labor Legislation* (1939), 23 Minn. L. Rev. 255. See also *Fraenkel, Recent Statutes Affecting Labor Injunctions and Yellow Dog Contracts* (1936), 30 Ill. Law Rev. 854; id. *Judicial Interpretation of Labor Laws* (1939), 6 Chicago Law Rev. 577.

The Court below made no extended argument in upholding the ordinance. It said only (R. 74) that there was "at least a logical argument that such is a proper exercise of the police power for the preservation of the public peace and safety." But there is no basis for the conclusion that all picketing must be banned in order to preserve peace and safety. On the contrary, it is just as unnecessary and improper to do this as it was to ban all leaflet distribution in order to preserve the cleanliness of the streets. The prohibition is mere legislative fiat.

Moreover, such fiat that all picketing is inherently unlawful is arbitrary and, regardless of any issue of free speech, would be a denial of due process under the rulings of this Court, such as *Fiske* v. *Kansas*, 274 U. S. 380; *Stromberg* v. *California*, 283 U. S. 359, and *DeJonge* v. *Oregon*, 299 U. S. 353. In all these cases state convictions were reversed because the State Court had so construed the applicable statute as to punish an act inherently lawful.

So in the case at bar the State Court has construed the ordinance as banning peaceful picketing, itself an act entirely lawful. The conviction must, therefore, be reversed.

CONCLUSION.

It is respectfully submitted, therefore, that the conviction appealed from must be reversed and the ordinance, as applied here, be declared unconstitutional.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION
as amicus curiae.

OSMOND K. FRAENKEL,
Counsel.

APPENDIX A.

(a) Statutes Similar to the Norris-LaGuardia Act.

Colo.: Stat. (1935), c. 97, § 78, Laws 1933, p. 406.
Conn.: Stat. (1939), c. 309a, § 1423c, Laws 1939, c. 251, § 4.
Idaho: Laws 1933, c. 215, § 3.
Ind.: Stat. (1933), § 40-504, Laws 1933, c. 12, § 4.
La.: Stat. (1938 Supp.), §4379.7, Laws 1934, c. 203, § 3.
Md.: Stat. (1935 Supp.), Art. 100, § 67, Laws 1935, c. 574.
Minn.: Stat. (1938 Supp.), § 4260.4, Laws 1933, c. 416—repealed and restricted by Laws 1939, c. 440.
N. Y.: Civil Practice Act, § 876-a (1), Laws 1935, c. 477.
Ore.: Stat. (1935 Supp.), § 49-1907, Laws 1933, c. 355—restricted by Laws 1939, c. 2.
Pa.: Stat. (1938 Supp.), Title 43, § 206f, Laws 1937, Act 308—restricted by Laws 1939, Act 163.
Utah: Stat. (1939 Supp.), Title 49, c. 2A, § 3, Laws 1933, c. 15.
Wash.: Stat. (1939 Supp.), § 7612.7, Laws, Spec. Sess. 1933, c. 7 (held unconstitutional in 1936—Blanchard v. Golden Age Brewing Co., 188 Wash. 396, 63 P. 2nd 397).
Wisc.: Stat. (1937), § 103.53, Laws 1931, c. 376—restricted by Laws 1939, c. 25.

(b) Other Statutes Indicating That Peaceful Picketing is Legal.

Ariz.: Code (1928), § 4286, Rev. Stat. 1913, § 1464.
Ill.: Stat. (1939), c. 48, § 2a, Laws 1925, p. 378.
Kan.: Stat. (1935), § 60-1107, Laws 1913, c. 233, § 4.
Mass.: Stat. (1939 Supp.), c. 149, § 24, Acts 1933, c. 272.
Mich.: Stat. (1938). 28.242, Laws 1935, No. 168.
N. H.: Laws 1935, c. 46.
N. J.: Stat. (1939), Title 2, c. 29, § 77, Laws 1926, c. 207.
N. M.: Laws 1939, c. 195, § 1.
N. D.: Laws 1935, c. 247, § 7.
Wyo.: Laws 1937, c. 15.